IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARIE J. FONTANA,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO CO., and BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor to the AMERICAN TOBACCO COMPANY,

Defendants.

CASE NO. 00-1731 CA01

# TRIAL

Volume 7

## TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Thomas S. Wilson, Jr., Circuit Judge, at the Dade County Courthouse, 73 W. Flagler Street, Miami, Florida, on Thursday, March 22nd, 2001, at 10:15 a.m.



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1 (THEREUPON, the following proceedings were held:)
2 THE COURT: Good morning, everybody. Have
3 a seat, make yourself comfortable.
4 Any changes since yesterday? Any
5 developments?
6 MR. HUNTER: No, Your Honor. But I would
7 like to make an objection to the line of
8 questioning we ended with on yesterday's
9 session, if the Court would permit.
10 MR. CHUMBLEY: Your Honor, could the
11 witness be excused if we're going to have a
12 legal argument?
13 THE COURT: Yes, he can step outside very
14 briefly.
15 (Dr. Foley left the courtroom.)
16 MR. HUNTER: The line of questioning that
17 we ended with, and I know is going to continue,
18 is for the witness to be cross-examined on the
19 basis of radiology reports by other
20 radiologists. And I object to that on the
21 grounds that I object to this line of
22 questioning on a doctrine that as a basic rule
23 of evidence, an expert cannot be confronted
24 with the opinion of another expert. And
25 essentially this is negative impeachment on the



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1 reports of another unknown individual.
2 In other words, this witness has looked at
3 X-ray films and has based his opinions on the
4 actual films themselves, and he has expressed
5 his opinion based on those films. He's now
6 being cross-examined on radiology reports of
7 other alleged but unknown experts whose
8 qualifications have not been established to the
9 Court on the basis of what is not in their
10 reports.
11 Now, that is negative impeachment. If
12 this was a criminal case and it was a police
13 officer, there's certain limits about what he
14 would be allowed to be impeached upon, about
15 what he didn't put in his own report.
16 THE COURT: That's true.
17 MR. HUNTER: But to allow impeachment of
18 this witness of what an unknown individual
19 didn't put in his report I think oversteps any
20 bounds, no matter how liberal a view you take
21 on impeachment. The thing is, I can't
22 cross-examine the expert who wrote those
23 reports because that expert is not in the
24 courtroom.
25 THE COURT: No, the only thing you can do



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1 is redirect, show him the films and let him do
2 what he probably would do.
3 But what's your side of this?
4 MR. REILLY: Your Honor, I find it ironic,
5 Mr. Hunter, who showed the report of
6 Dr. Gardiner, his interpretation of the CT scan
7 and said: Do you agree with this, is this what
8 Dr. Gardiner found during his direct
9 examination? And suggest that I can't do the
10 same thing with the other people who read the
11 radiology.
12 These medical records are in evidence. I
13 can show these records to this witness, he can
14 look at them and say: This is what this person
15 found. I disagree. He can put the X-rays up,
16 he can say: This person should have mentioned
17 this. Or he can say: I see this. Or whatever
18 he wants to say about them. But Mr. Hunter
19 can't offer up a case that says that I can't do
20 what I'm doing because this is completely
21 appropriate examination.
22 MR. HUNTER: I do have cases on this.
23 MR. REILLY: Your Honor, Mr. Hunter did
24 the exact same thing yesterday. But what's
25 good for the goose is good for the gander.



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1 This is appropriate cross-examination. These
2 are medical records that this witness says he
3 looked at.
4 THE COURT: No, this witness did not say
5 he looked at these reports. This witness says
6 that he looked at the X-rays.
7 MR. REILLY: No, Your Honor.
8 THE COURT: And he didn't pay attention to
9 the reports because his job was to look at the
10 X-rays and make an opinion based on the X-rays,
11 and I assume so he wouldn't really pay any
12 attention to the reports so he could go in with
13 an open view.
14 MR. REILLY: Your Honor, this witness said
15 he had the X-ray reports in his bag and he said
16 he had them there at the deposition when I took
17 his deposition. And I maintained that I had
18 failed to look at those documents, but they
19 were there.
20 THE COURT: That doesn't mean he read
21 them. What his testimony was over and over and
22 over again was he looked at the pictures
23 themselves and did not rely upon anybody else's
24 prior conclusions.
25 MR. REILLY: I don't dispute any of what



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1 you just said, Your Honor. I don't dispute
2 that he maintains that what he did was
3 something that he likes to do, which is put the
4 X-rays up, look at them and make his own
5 presentation.
6 THE COURT: Which by far is the better way
7 of evaluating them, than go look at the raw
8 material and put an already preconceived idea
9 in your head.
10 MR. REILLY: Your Honor, that's a decision
11 somebody has to make for themselves.
12 THE COURT: Well, it's pretty well
13 scientifically established, to have a valid
14 test, that it's best to have somebody with an
15 open mind. I think even you'd agree with me on
16 that.
17 MR. REILLY: Your Honor, every medical
18 expert that comes into this courtroom is going
19 to have reviewed the medical records in this
20 case.
21 THE COURT: Right.
22 MR. REILLY: How else would they know what
23 was going on with this patient?
24 THE COURT: We're not talking about the
25 other records in the case, we're talking about



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1 X-rays.
2 MR. REILLY: That's part of what these
3 people look at.
4 THE COURT: I understand X-ray is part of
5 a medical report. But my point to you is --
6 and I think we're off base now, well off of
7 what's at issue -- but my point to you is that
8 if I want to have an independent, clear view of
9 what an X-ray says, I would rather have the
10 expert just look at the X-rays as opposed to
11 first reading somebody's report and then having
12 to go in and look at an X-ray with already
13 somebody's opinion stuck in my head.
14 MR. REILLY: Judge, I'm not disputing
15 whether that's a better method or not. The
16 only issue before you is whether or not I get
17 to put matters, medical records that are in
18 evidence, in front of this witness, who is
19 qualified, you've qualified him as a radiology
20 expert. You've allowed him to testify as to
21 his opinions as to what's on the X-rays.
22 Now, I get to show this witness, just as
23 Mr. Hunter did, what the people at the time
24 that the X-rays were taken, that are in
25 evidence in this case, interpreted those X-rays



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1 to be.

2 There is nothing in the rules of evidence

3 that say that can't be done. The only thing

4 that can't be done is I can't put my medical

5 expert on the stand and have him say: I

6 disagree with Dr. Foley.

7 He can say: I don't find whatever Foley

8 says -- for example, if Dr. Foley says that he

9 sees emphysema on the X-ray, my expert

10 certainly can say: I don't see emphysema on

11 the X-ray.

12 THE COURT: No question.

13 MR. REILLY: But he can't say: I disagree

14 with Dr. Foley, Dr. Foley is wrong, Dr. Foley

15 doesn't know what he's talking about.

16 That's what the rules of evidence provide.

17 But it doesn't provide that I can't put a

18 medical record that is in evidence, that's been

19 stipulated to, and say: Dr. Foley, did the

20 person who interpreted the X-ray back when it

21 was taken interpret the X-ray to include

22 references to emphysema and peribronchial

23 thickening?

24 There is no rule of evidence that says

25 that. These matters are in evidence. They are



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1 not a comment on Dr. Foley's --
2 THE COURT: Let me hear what -- I
3 understand where you're going. Let me see the
4 cases that you have.
5 MR. HUNTER: All right. It is essentially
6 the case law that I'm referring to, and this is
7 still good law, is the case of Carlton versus
8 Bielling, at 146 So.2d, 915.
9 And here's the Court's discussion was
10 this: The question sought to elicit an opinion
11 of the witness as to the validity of opinions
12 expressed by the plaintiffs' expert witnesses.
13 Now, that you cannot do. You cannot ask
14 one witness to express an opinion about another
15 witness' opinion.
16 Now, what Mr. Reilly is doing here is he
17 is, by cross-examining an expert who relied on
18 the film, he's trying to cross-examine him on
19 the expert opinion of another expert who looked
20 at the same film, but who is not in the
21 courtroom but his report is, which is his
22 opinion, it's an expert opinion by a
23 radiologist.
24 What he's doing is trying to impeach one
25 expert's opinion based on the opinion of



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1 another expert who, first of all, is not here,
2 I can't cross-examine him. His record,
3 although it's in evidence, oftentimes, if
4 Mr. Reilly had called an expert who had read
5 the X-rays and his testimony was in evidence,
6 he still couldn't ask this witness to express
7 an opinion about that witness' opinion, which
8 would be in evidence, just as these reports
9 are.
10 But he's, even though he's not allowed to
11 do that, which I can't cross-examine these
12 radiologists, he's going the further step,
13 under 608, who may impeach, in the notes of the
14 Florida Evidence Courtroom Manual, where they
15 talk about negative impeachment. This is a
16 term of art meaning impeachment by showing the
17 absence of a fact from a report, frequently a
18 police report.
19 And what he's trying to do is he's not
20 only asking one expert, he's trying to
21 cross-examine one expert who didn't rely on
22 this report, he relied on the film, he's trying
23 to cross-examine him on the opinion of another
24 radiologist.
25 But he's then going the next step to



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1 impeach him on negative impeachment, what is
2 not in the other radiologist's report. There's
3 no way for me -- that's improper, two steps
4 improper, and there's no cure for it.
5 The only cure for it would be for me to
6 call every radiologist and put him on the stand
7 and say: Why didn't you put the findings of
8 peribronchial thickening and centrilobular
9 emphysema, which would complicate this trial.
10 And plus he's already made this point, he
11 can make this point with one question: None of
12 the other radiologists reported the findings
13 that you see. And the witness can answer yes
14 or no.
15 And if he plans to continue on to do this,
16 this line of questioning and this nature of
17 cross-examination is barred by 90.403, on the
18 grounds that it's inefficient and constitutes a
19 waste of time. Unattended by the risk of
20 unfair prejudice, confusion or inefficiency,
21 the trial judge should exercise his inherent
22 power to compel the use of alternate method of
23 proof. Which would be to say: Mr. Reilly, if
24 you want to make your point, make it one time
25 and go on.



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1 That is, say to the witness: Has anybody
2 else reported the findings that you see? And
3 then go on. But I foresee this as having to
4 drag on throughout the entire morning.
5 THE COURT: Briefly in response.
6 MR. REILLY: Your Honor, simply, at Page
7 676 of the transcript yesterday, Mr. Hunter
8 said: And isn't this in fact the radiologist's
9 report that was prepared in 1996 that
10 corresponds to these CT scans?
11 MR. HUNTER: Let me interrupt. I don't
12 object to cross-examination on my direct. That
13 was something he relied on, that is not part of
14 my objection.
15 MR. REILLY: You see the incredible double
16 standard that Mr. Hunter is promoting. If he
17 showed it to his witness and talked to him
18 about it, it's a CT scan, it's part of the
19 records.
20 THE COURT: That was Coopersmith, right?
21 MR. REILLY: No. No. It's Dr. Gardiner
22 not Dr. Coopersmith.
23 What Mr. Hunter did yesterday, which was
24 completely appropriate and I didn't object to
25 it, was he put Gardiner's CT interpretation up



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1 on the Elmo and said, "Isn't this in fact the
2 radiologist's report that was prepared in 1996
3 that corresponds to these CT scans?
4 "Answer: Yes, it is.
5 "Okay, this lawsuit was filed in, I want
6 you to assume the year 2000. In fact, the
7 diagnosis of the doctor at the time was severe
8 COPD."
9 THE COURT: Well, that goes --
10 MR. REILLY: That is exactly what he's
11 saying I can't now do with the other radiology
12 report.
13 THE COURT: To a degree I have to agree
14 with him. I think we're wasting our time by
15 going through all of these individually,
16 because I think we've already had three or four
17 examples of the same thing.
18 MR. REILLY: Your Honor, let me tell you
19 something, I'm only in 1989, but there are
20 literally scores of these records and I'm not
21 going to go through every one of them. I've
22 picked out maybe five or six or seven that --
23 THE COURT: Why don't you identify the
24 five or six or seven that you have a problem
25 with and ask him if they contradict or disagree



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1 with what his findings are.
2 MR. REILLY: Here's what I intended to do
3 with them. Put them on the Elmo, run through
4 them and say: Did this radiologist or did this
5 pulmonologist, what did this pulmonologist
6 find, what did this radiologist find, and did
7 this radiologist or pulmonologist find or make
8 reference --
9 THE COURT: I'm not concerned about what
10 he in fact found. I'm more concerned whether
11 he disagreed or didn't find what Dr. Foley
12 testified to.
13 MR. REILLY: That's the only other thing I
14 ask: Is there any mention here of
15 peribronchial thickening or emphysema?
16 That's all.
17 THE COURT: Then why can't we do it all at
18 once, and say: Here, I'll show you. Not even
19 show you them. I guess you're going to have to
20 show him the reports since he hasn't read any
21 of those reports.
22 MR. REILLY: Well, I don't know whether
23 he's read them or not. But Your Honor, I'm not
24 planning on taking another day with this
25 gentleman.



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1 THE COURT: You can believe me you're not,
2 because that won't take place.
3 MR. REILLY: That's not my intention.
4 THE COURT: But I can't understand, we've
5 already done this with two or three or four
6 radiology reports. It's getting very, very,
7 very repetitious. Why don't you ask him about
8 the reports and say that they didn't make the
9 same finding that he did.
10 MR. REILLY: You know what, that's what I
11 intend to do. And I do have a little more
12 impeachment of him on his own interpretations.
13 I don't mind that, that's fair game. That's
14 what I thought cross-examination was.
15 MR. REILLY: All I'm doing is taking him
16 through some different time frames, unless he
17 takes a long time answering me. I mean, these
18 records speak for themselves. People wrote
19 what they wrote; all he's got to do is say yes
20 or no.
21 THE COURT: Why can't you say: Doctor,
22 you're aware of A, B, C and D reports?
23 MR. REILLY: Mr. Hunter shouldn't be able
24 to dictate exactly how I cross-examine his
25 expert.



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1 THE COURT: He isn't. Matter of fact he
2 let it go for an entire afternoon.
3 MR. REILLY: I understand what Your Honor
4 is permitting me to do. I can ask him about
5 these opinions, what they wrote in their
6 charts, and I'm not going to do --
7 MR. HUNTER: It's what they didn't write.
8 MR. REILLY: Sure, what he didn't write is
9 equally as important.
10 THE COURT: But that goes into the area of
11 negative impeachment. He's correct. There
12 wasn't any objection yesterday so I didn't make
13 any rulings.
14 MR. REILLY: Your Honor, I'm not
15 negatively impeaching him. All I'm saying is
16 there is a difference between what they found
17 and what he found.
18 THE COURT: What is negative impeachment
19 if it's not a difference?
20 MR. REILLY: I frankly am a little puzzled
21 by the concept of negative impeachment. If at
22 any time anybody disagrees with somebody,
23 that's negative impeachment.
24 THE COURT: It's been defined by the cases
25 and more recent than what Mr. Hunter said,



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1 where they talk to: Well, isn't it a fact,
2 sir, if you found such and such it would be in
3 your report?
4 MR. REILLY: I'm not asking that, I'm not
5 asking whether or not these people deviated
6 from appropriate care or whether they were
7 wrong. I'm not trying to impeach this person,
8 I'm trying to impeach this person.
9 All I'm saying is this is what this person
10 found and this is what they wrote down, just as
11 Mr. Hunter did, this is what this person found.
12 What Mr. Hunter likes -- we're overarguing
13 this. You've already told me I can do exactly
14 what I intend to do, and it won't take that
15 long. We're taking more time now than it's
16 going to take to do this.
17 THE COURT: I want to put it into one
18 simple question. I'll give you one more report
19 to do and then I'll say it's cumulative. Then
20 you put them all together into one question and
21 answer.
22 MR. REILLY: Your Honor, you can't do that
23 to me and let me explain why. For example,
24 there are changes that occur over time, new
25 findings that are made. There are new findings



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1 that are reflective of her increasing problems
2 with sarcoidosis. There are problems --
3 THE COURT: Do you have any -- I take it
4 you have a radiologist or two that's going to
5 come in and testify opposite Dr. Foley.
6 MR. REILLY: Sure.
7 THE COURT: He's going to go over, is he
8 not, all the X-rays, all the CAT scans and show
9 where Foley is wrong and he's right?
10 MR. REILLY: Your Honor, the truth of the
11 matter is I wouldn't do that and I'm not doing
12 that with Dr. Foley. Your Honor, we'd be here
13 for weeks if I went through all the X-ray
14 interpretations that don't say what Dr. Foley
15 said. I have culled that number to probably
16 five or six. This is -- Your Honor has the
17 impression that this is going to take a long
18 time. The truth of the matter is that if Dr.
19 Foley simply says, you're right, there is no
20 reference to peribronchial thickening or
21 emphysema in that report, this will take ten
22 minutes.
23 THE COURT: Why can't you do all of the
24 five or six reports that you have left over
25 into one question?



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1 MR. REILLY: Because they also reflect
2 changes that are going on that Dr. Foley has
3 found, everybody finds, they show to this jury
4 the progression of the sarcoidosis.
5 THE COURT: If it's not in disagreement,
6 then what's the problem? If Foley finds it
7 also as far as sarcoidosis, all it is is
8 cumulative. He's not disagreeing with you on
9 progression of sarcoidosis at all.
10 MR. REILLY: But there are changes -- Your
11 Honor, I can't do it in one question because
12 there are changes in opinion -- you know what,
13 Mr. Hunter is making me now show this witness
14 what's going to happen on cross-examination.
15 And that's not right. I can't do in it in one
16 document.
17 I'm telling you I'm not going to be overly
18 long if this witness simply answers the
19 questions.
20 THE COURT: Well, I'll give you a shot at
21 it, but believe me, I'm going to cut you off
22 pretty quickly if it proves otherwise.
23 MR. REILLY: If this witness simply says
24 yes or no --
25 THE COURT: I just told you the



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1 parameters.
2 Bring the doctor back in, please.
3 Todd, do we have a jury?
4 THE BAILIFF: Yes, sir.
5 THE COURT: Bring them in.
6 (The jurors entered the courtroom.)
7 THE COURT: Good morning, ladies and
8 gentlemen. Hope everybody is doing well.
9 Let the record reflect all our jurors are
10 present and accounted for and we're ready to
11 proceed.
12 Mr. Reilly.
13 **CROSS EXAMINATION CONTINUED**
14 **BY MR. REILLY:**
15 MR. REILLY: Thank you, Your Honor.
16 BY MR. REILLY:
17 ***Q.*** Dr. Foley, yesterday we were talking about
18 the difference between pulmonologists and
19 radiologists, one of the differences is that a
20 pulmonologist is what's known as an attending
21 physician, correct?
22 ***A.*** Well, that's not a difference between a
23 radiologist, because radiologists can be attending
24 physicians as well.
25 ***Q.*** But I didn't ask you that. I just want to



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1 know, is a pulmonologist an attending physician?
2 **A.** You asked one of the differences is that a
3 pulmonologist is an attending physician and I'm
4 saying that that's not a difference. Radiologists
5 and pulmonologists can both be attending physicians.
6 **Q.** Doctor, who makes the diagnosis of a
7 condition in a patient in the case of COPD?
8 **A.** Well, you can make the diagnosis either
9 clinically or radiographically, such as was in one
10 of these reports where the radiologist read severe
11 COPD.
12 **Q.** Did you construe that report to be a
13 diagnosis?
14 **A.** Well, conclusion is a diagnosis, that's
15 what you're saying you believe is showing on the
16 films.
17 **Q.** Don't radiologists, when they fill out
18 their forms at the hospital, interpreting X-rays,
19 refer to them as impressions?
20 **A.** No, that's not standard. You can say
21 impression, conclusion or diagnosis, or comment.
22 There's various ways that you can end your report.
23 **Q.** We talked about this a bit yesterday.
24 Have you looked at the radiology reports of the
25 radiologists in this case?



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1 **A.** I have some of them with me today, yes.
2 **Q.** Do any of them use the term "diagnosis?"
3 **A.** I don't see that these particular
4 radiologists do, but some radiologists do use that.
5 **Q.** What term do every one of those
6 radiologists use?
7 **A.** So far the ones I have they use the word
8 "impression".
9 **Q.** Look at them all, please.
10 **A.** The ones that I have say "impression" on
11 it.
12 **Q.** Did you bring with you to the stand all of
13 the reports of the radiologists in this case?
14 **A.** Just the ones that I had when you and I
15 met.
16 **Q.** Do you know whether or not that's all of
17 the reports of the radiologists?
18 **A.** I presume that it's not, because I don't
19 have reports for every film that were in the film
20 packs.
21 **Q.** Now, some of the films you reviewed,
22 matter of fact, every film you put up in front of
23 this jury, not one of them, the X-rays, had been
24 reviewed by a radiologist, hadn't they?
25 **A.** I have no idea.



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1 Q. Well, didn't you look to see where those
2 X-rays were taken?
3 A. No, it wasn't important, as I said before,
4 to know where the films were taken. My job, when I
5 was asked to look at these films, was to look at the
6 films and give an opinion. It was not, I was not
7 asked to make a correlation between what I thought
8 and what a radiologist thought. And I was not asked
9 to look at the medical records and compare what the
10 medical records said regarding pulmonologist versus
11 what a radiologist said or any other thing.
12 Q. The X-ray of 5-12-89, do you know where
13 those were taken?
14 A. No, sir.
15 Q. The X-ray of 1-29-90, do you know where
16 that was taken?
17 A. No, sir.
18 Q. The X-ray of 1-3-92, do you know where
19 that was taken?
20 A. Well, I mean, I can find them if I look at
21 the report, but I don't know off the top of my head.
22 Q. Go ahead, look in your reports if you
23 will, please, and tell me if you find a radiology
24 report for 1-3-92.
25 A. If I have the report I'll be glad to.



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1 My reports only go back to 1-14-94, that
2 one was Boca Raton Community Hospital.
3 **Q.** And you didn't select that to show to this
4 jury, did you?
5 **A.** Select what, the films?
6 **Q.** The X-ray from that --
7 **A.** I have no idea if that film was up there
8 or not. These are just the reports that I managed
9 to pull out of the medical records that I have
10 without trying to make any correlation one way or
11 the other of whether they match up to the view box
12 or not.
13 **Q.** Aren't you the person that selected the
14 films to show this to this jury?
15 **A.** Yes.
16 **Q.** You don't know which films?
17 **A.** Well, I can look them up and tell you. I
18 didn't -- I didn't think this was a memory contest,
19 I can read the dates that I selected. I don't know
20 them off the top of my head.
21 MR. REILLY: Your Honor, I would object to
22 Dr. Foley's comments.
23 THE COURT: Okay, noted.
24
25 **A.** The films that you've handed me, the minis



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1 of those films, 11-6-95, 9-9-99, 11-19-99. CT from
2 12-23-96, a film from 2-6-01, a film from 5-12-89,
3 film from 1-29-90, film from 1-3-92. And another CT
4 from 12-23-96.
5 **Q.** Now, excluding the CTs, can you now tell
6 us whether or not you selected a single film, a
7 single X-ray that corresponds to a radiographic
8 report by a radiologist?
9 **A.** By a radiologist?
10 **Q.** Yes.
11 **A.** As I said before, I have not looked to
12 these, whether they're radiology reports specific or
13 done at a pulmonologist's office or not. I've not
14 made any attempt to try to pull films that are from
15 one variety or another. I pulled films that I
16 thought were representative samples of the
17 progression seen on Ms. Fontana's films over the
18 course of the years without any predilection for
19 trying to pick only radiologist's dictations or
20 nonradiologist's dictations.
21 **Q.** The fact is, Doctor, all the X-rays that
22 you showed this jury had been taken by
23 pulmonologists, correct?
24 **A.** It appears so, I had no idea that that's
25 the way it is, but it appears so.



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1 Q. All right. Have you had an opportunity to
2 review all of the radiology reports that you have
3 there?
4 A. I've looked over them, yes.
5 Q. I think you indicated you don't have one
6 from anything earlier than 1994?
7 A. Yes.
8 Q. So, for example, I'm just going to pick
9 one radiology report from maybe a year, maybe every
10 two years or three years.
11 MR. HUNTER: Judge, I object to him being
12 cross-examined on reports of other doctors who
13 are not in this courtroom.
14 THE COURT: Let's have a legal objection,
15 not a speaking objection.
16 MR. REILLY: I object to him being
17 cross-examined on reports of other physicians
18 rather than the films.
19 THE COURT: Overrule the objection at this
20 time.
21 MR. REILLY: I'm going to have to figure
22 out what number goes with your numbers.
23 BY MR. REILLY:
24 Q. Can everybody see that? I have to put my
25 glasses on.



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1 Doctor, this is a radiology report by
2 Dr. Richard Beerman, taken or performed on March 26,
3 1990; is that correct?
4 **A.** Yes.
5 **Q.** And by this time in your interpretation
6 you've seen both peribronchial thickening and
7 emphysema on the X-rays of Ms. Fontana, correct?
8 **A.** I think -- and you're referring back to my
9 deposition or yesterday's trial?
10 **Q.** No, yesterday's trial.
11 **A.** Okay, yes, I think she has peribronchial
12 thickening and emphysematous change.
13 **Q.** And you would agree with me that
14 Dr. Beerman makes no mention of either?
15 **A.** Correct, I do not see any mention of that.
16 **Q.** Everything that he talks about he
17 ultimately says are consistent with the patient's
18 diagnosis of sarcoidosis, correct?
19 **A.** Yes, sir.
20 **Q.** And do you know what diagnosis had been
21 made of this patient at this point in time by the
22 physicians who are caring for her, her
23 pulmonologist?
24 **A.** No. As I told you, I have not looked at
25 the medical records with that in mind or any



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1 chronology regarding that.
2 **Q.** Do you know who the pulmonologist was who
3 was caring for her at this time?
4 **A.** As I told you before, I've not made any
5 review or significant review of any of the medical
6 records with regard to treating physicians. I've
7 looked at the radiology films.
8 **Q.** Do you know whether any physician at any
9 time who was caring for Ms. Fontana ever diagnosed
10 her with emphysema?
11 **A.** Again, I would have to answer the same way
12 because I told you I've not looked to the medical
13 records regarding anything specific. I've looked at
14 the radiology films.
15 **Q.** Do you know whether any physician at any
16 point in time who was caring for Ms. Fontana ever
17 diagnosed her with a disease process consistent with
18 peribronchial thickening other than sarcoidosis?
19 MR. HUNTER: Objection, repetitive.
20 THE COURT: Sustained.
21 BY MR. REILLY:
22 **Q.** Doctor, I'm going to take you to 1994.
23 This is a radiology report from Dr. J
24 Wiener; is that correct?
25 **A.** Yes, sir.



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1 Q. And would you agree with me that there is
2 no indication in this report of 1-14-94 of
3 peribronchial thickening?
4 A. Yes, sir. As we mentioned before, we do
5 not see the word "peribronchial thickening" on that
6 report.
7 Q. Nor is there any reference to emphysema,
8 is there?
9 A. That's correct.
10 Q. And the reference in these radiographic
11 findings are nonspecific but would be suggestiveive
12 of sarcoidosis, correct?
13 MR. HUNTER: Judge, I object as cumulative
14 and negative impeachment.
15 THE COURT: Overruled at this time.
16 BY MR. REILLY:
17 Q. Is that correct, Dr. Foley?
18 A. That's correct. I think there's a good
19 explanation for that.
20 MR. REILLY: Your Honor, I object to Dr.
21 Foley --
22 MR. HUNTER: The witness should be allowed
23 to explain his answer.
24 MR. REILLY: I'm sure he'll get to it
25 later.



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1 THE COURT: Let's all keep the comments
2 down.
3 BY MR. REILLY:
4 Q. I'm going to move ahead to 1996. This is
5 January 4th, 1996; is that correct? Can you see
6 that?
7 Have you looked at this report?
8 A. Let me take a look and see if I have it.
9 Yes, I have that report.
10 Q. All right, it's a CT scan, isn't it?
11 A. Yes.
12 Q. This is taken in January 4th, 1996 and
13 interpreted by Dr. V. P. Mazzeo, correct?
14 A. Correct.
15 Q. Now, does this report make any mention of
16 peribronchial thickening?
17 A. I do not see any report of peribronchial
18 thickening on that report. Although I would have to
19 say that the report is actually a combined report,
20 which is dictating a CT scan of the chest, abdomen
21 and pelvis.
22 Q. You're right.
23 A. And it's not the usual way one would
24 dictate a report such as that. The way it's
25 recommended that one should dictate a report such as



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1 that is that you should have separate titles for the
2 type of report, the body and conclusion for each
3 separate section. So it should read: CT scan of
4 the chest. Then your dictation. Then a separate
5 conclusion. Then CT scan of the abdomen, body of
6 the report, conclusion, and then CT scan of the
7 pelvis.
8 And the reason for that is that when you
9 do it this way, many times you're not thorough in
10 your complete explanation of everything that you can
11 see.
12 **Q.** All right.
13 Did --
14 **A.** But I agree with you that I do not see
15 peribronchial thickening in that report.
16 **Q.** Nor is there any reference to emphysema,
17 is there?
18 **A.** No, sir, I agree with that too.
19 **Q.** And if we look at the line entitled
20 Impression and then it says No. 1 --
21 Right here?
22 **A.** Yes, sir.
23 **Q.** -- it says: There is extensive
24 mediastinal and hilar adenopathy with bilateral
25 pulmonary infiltrates, predominantly within the



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1 upper lung fields, overall. These findings within
2 the lungs would be compatible with the diagnosis of
3 sarcoidosis, though the differential would include
4 other etiologies, including lymphoma and metastatic
5 disease. Correct?
6 **A.** Yes, sir.
7 **Q.** No mention of emphysema?
8 **A.** No, sir.
9 **Q.** Now, yesterday Mr. Hunter showed you a CT
10 scan taken 12-23-96, right?
11 **A.** Yes, sir.
12 **Q.** And that one makes reference to severe
13 COPD, right?
14 **A.** Yes, sir.
15 **Q.** The first -- this is one performed on
16 12-23-96 by Dr. H. F. Gardiner, right?
17 **A.** Yes.
18 **Q.** And after discussing all the observations
19 he makes, his first impression is extensive
20 mediastinal and hilar lymphadenopathy. And he
21 ultimately gets around to saying: Consider
22 sarcoidosis, tuberculosis, histoplasmosis. Lymphoma
23 or metastatic malignancy are less likely although
24 not completely excluded and should perhaps also be
25 considered as a concomitant process, right?



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1 **A.** Yes.

2 **Q.** Then he says, No. 2, severe COPD. Basilar
3 fibrosis, bullous changes.

4 No. 3, prominent opaque changes related to
5 the posterimedial upper mid right chest and upper
6 right chest reference scans 8 and 11, probably
7 indicative of inflammatory process or fibrosis. No
8 definite evidence of mature abscess or fungus ball.
9 Neoplasm is considered less likely although not
10 totally excluded.

11 Now, that is a differential by
12 Dr. Gardiner, isn't it?

13 **A.** Yes, sir.

14 **Q.** He lists a whole host of possible things
15 going on in this person

16 **A.** Well, in the impression number 1, he does
17 discuss a differential, and I think that's a very
18 proper differential, as I discussed before talking
19 about the mediastinal and hilar adenopathy. That's
20 what you would have to consider.

21 And I believe that that is correct. I
22 think this is automatically magnifying there.

23 **Q.** Sorry. Bad finger.

24 **A.** The impression number two, however, is not
25 a differential, that is a statement. He said:



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1 Number 2, Severe COPD.
2 He doesn't say: Consider this, that and
3 the other. He makes a statement. And then in
4 number 3, I believe as you pointed out, he discussed
5 some other possibilities that he didn't see a
6 definite abscess, he didn't see a definite fungus
7 ball and he referenced a couple scan slices. Then
8 he said: Neoplasm is considered less likely but not
9 totally excluded.
10 He wanted to make sure that they
11 understood that with all of these findings there
12 could still be an underlying neoplasm so don't
13 totally throw that out of the picture when you're
14 working this patient up.
15 **Q.** So you're saying to this jury that Dr.
16 Gardiner made a differential under category number
17 one, right?
18 **A.** Yes, sir.
19 **Q.** And a differential under category number
20 3, right?
21 **A.** Well, I don't think he really gave a
22 differential in category 3. He explained some
23 pertinent negatives that he didn't see. But he
24 warned that he couldn't -- and that was pertinent
25 negatives where he didn't see a definite abscess or



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1 a fungus ball, but he warned that he couldn't
2 entirely exclude neoplasm because of all the
3 findings going on in that person's chest.
4 **Q.** And number 2 you say is a definite
5 diagnosis by him, right?
6 **A.** Well, there's no differential discussed,
7 there's no warning, he says severe COPD, period. He
8 doesn't say consider that it could be a big
9 inspiration by the patient, or consider that the CT
10 scanner may have acted funny and has given pictures
11 that look like COPD. He says: Severe COPD, period.
12 **Q.** Did Dr. Gardiner ever look at radiology of
13 this patient again?
14 **A.** You keep asking me questions about various
15 names and so forth. I've told you I've not made a
16 habit in this case to try to look at the names. I
17 have no idea if Dr. Gardiner has ever read another
18 film before or after that one, because I've not
19 looked at any of the names with that in mind.
20 **Q.** Well, that CT scan was interpreted on
21 12-23-96, right?
22 **A.** Yes, sir.
23 **Q.** Dr. Gardiner --
24 **A.** Who did you say interpreted the CT scan,
25 by the way? Because on the bottom of the report it



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1 doesn't say the doctor's name. Then when you flip
2 it over to the next report, which is a chest, it
3 says K. R. Stein. Is Gardiner the one who read the
4 CT? Because I don't see his name typed.
5 **Q.** Well, let's back up.
6 Doctor, when you are in your hospital --
7 let's go back to the CT of December 23rd, '96.
8 Don't you sign off on your reports?
9 **A.** We electronically sign our reports, and
10 our entire name is printed out. It would say
11 Michael J. Foley, MD, electronically signed and
12 verified.
13 **Q.** Do you know how they do it at Dr.
14 Gardiner's hospital at Holy Cross?
15 **A.** Well, it looks like in Dr. Gardiner's
16 hospital they type his initials HPG at the bottom,
17 along with the transcriptionist's initials.
18 **Q.** Don't you see a big "G" over the name at
19 the top?
20 **A.** Now that you pointed it out. I really
21 haven't looked at that as that would be his entire
22 name, Gardiner.
23 **Q.** Doctor --
24 **A.** That's fine, I'm not trying to argue with
25 you. I'm trying to ask you, did Dr. Gardiner read



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1 this report? That's all I need to know. Because
2 now you're asking me, did Dr. Gardiner read any
3 other reports? I didn't know Dr. Gardiner read this
4 report. If Dr. Gardiner did, fine. Did Dr.
5 Gardiner read this report? And I guess the answer
6 would be yes.
7 That's all I need. I don't need to argue
8 with you about it.
9 **Q.** Now, you mentioned Dr. Stein. Dr. Stein
10 came on -- that chest X-ray you're talking about is
11 dated 1-6-97, isn't it?
12 **A.** Yes, sir.
13 **Q.** So when you said, "I can't tell who did it
14 because the chest X-ray is right behind it," it's a
15 completely different day, isn't it?
16 **A.** Which one are you talking about?
17 **Q.** The one you just said, you said you
18 couldn't tell whether Stein had done it or Gardiner
19 had done it. But in fact the chest X-ray is taken
20 1-6-97?
21 **A.** That particular one. I have another chest
22 X-ray, and when I look at the bottom, stapled to
23 this report, which was the way this was given to me,
24 is a chest film from 1-3-97, and it says K. R.
25 Stein.



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1 Q. You have one from 1-3-97?
2 A. Yes.
3 Q. What's the date of the CT scan?
4 A. 12-23-96.
5 Q. Completely different dates, right?
6 A. Yes, sir. But I'm just asking you, when I
7 asked you this question, I asked: Did Dr. Gardiner
8 dictate this?
9 That's all I asked.
10 Q. I have another one from Dr. Stein. I have
11 the one from Dr. Stein dated 1-3-97, right?
12 A. Yes, sir.
13 Q. And under her impression, she says: 1,
14 biapical infiltrative change, denser on the right
15 with underlying cystic change and volume loss.
16 Diffuse interstitial changes in the mid and lower
17 lung?
18 A. Yes, sir.
19 Q. No mentioning of peribroncheal thickening?
20 A. No.
21 Q. Then she has: Fairly extensive bilateral
22 hilar adenopathy and mediastinal adenopathy.
23 Multiple differential possibilities have been
24 previously described in the CT examination of the
25 chest.



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1 Now, a minute ago you told us that severe
2 COPD was not a differential, but here's Dr. Stein
3 several days later describing what's on that CT film
4 interpretation as multiple differential
5 possibilities, correct?
6 MR. HUNTER: I object to what Dr. Stein is
7 saying concerning what Dr. Gardiner is saying.
8 THE COURT: Sustained.
9 THE WITNESS: Just to respond --
10 THE COURT: There's no question pending.
11 THE WITNESS: Okay. I --
12 THE COURT: Excuse me, no question
13 pending.
14 BY MR. REILLY:
15 **Q.** Dr. Stein makes no mention of emphysema or
16 peribronchial thickening, correct?
17 **A.** Correct.
18 **Q.** Now, Dr. Gardiner is 1-6-97, correct?
19 **A.** Yes, sir.
20 **Q.** There is 31 days in December, that's
21 seven, eight and six is -- two weeks later the same
22 Dr. Gardiner that interpreted the CT film interprets
23 a chest film, correct?
24 **A.** Yes, sir.
25 **Q.** Does he make any mention of peribronchial



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1 thickening?
2 **A.** No. No, sir.
3 **Q.** Does he make any mention of C -- severe
4 COPD?
5 **A.** Yes, sir, he does.
6 **Q.** Where does he say "severe COPD"?
7 **A.** Well, he doesn't use the same exact words,
8 but the word "air trapping" is another synonomous
9 word for COPD among radiologists' dictating.
10 **Q.** Doctor, aren't there multiple causes of
11 air trapping visible on X-ray?
12 **A.** There's multiple causes of COPD, too, yes,
13 sir.
14 **Q.** Can't sarcoidosis result in the appearance
15 of air trapping?
16 MR. HUNTER: Judge, I would object to
17 argumentative on the report of another
18 physician who is not in this courtroom.
19 MR. REILLY: Your Honor, that's not what
20 I'm doing. I asked him whether air trapping
21 can be a sign on X-ray --
22 THE COURT: Overruled.
23 THE WITNESS: And the question again is,
24 can the air trapping --
25 BY MR. REILLY:



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1 **Q.** -- be a sign of sarcoidosis on X-ray?
2 **A.** It's not typically a sign of sarcoidosis,
3 no, sir.
4 **Q.** I'm not asking you typically, I'm asking
5 can it be?
6 **A.** Well, in the field of medicine, a lot of
7 things may have a one percent chance of can it be.
8 When I'm answering you, I'm trying to give you the
9 best medical advice of whether that would be an
10 indication of sarcoidosis. And my answer would be,
11 air trapping is not an indication of sarcoidosis.
12 It is not a classical description of sarcoidosis.
13 If I saw air trapping in a report such as
14 he's describing, I would ascribe that to a
15 synonomous term which would be emphysema or COPD.
16 That's the kind of term that's used to describe COPD
17 or emphysema.
18 **Q.** So, so far in looking at X-rays and CTs
19 all the way through, starting in 1989 and coming
20 through 1-6-97, you think that there is a physician,
21 one of these physicians who has identified the same
22 COPD that you did?
23 **A.** Well, I think, yes. They're identifying
24 COPD at an end stage. What I've tried to do for the
25 jury is to talk about the earliest times that we can



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1 see COPD or emphysema in this patient. And that has
2 not been in the earlier films. They were talking
3 about the predominant finding that they were seeing,
4 which is sarcoid.
5 And when they're asked to rule out
6 sarcoid, the radiologist's natural tendency would be
7 to address the issue of sarcoid being asked. No one
8 ever asked the radiologist: Rule out COPD on any of
9 the chest films that I've seen. So naturally, even
10 if there is mild hyperaeration present, or
11 centrilobular emphysema, they're not going to raise
12 that until it becomes a predominant finding on the
13 film.
14 *Q.* That's your explanation for why none of
15 the radiologists whose reports we've looked at thus
16 far have identified severe COPD on any of their
17 radiology reports, correct?
18 MR. HUNTER: Judge, I object. It's
19 argumentative and inaccurate because there
20 was --
21 THE COURT: Sustained.
22 BY MR. REILLY:
23 *Q.* Do you know who was treating Ms. Fontana
24 on 1-2-97?
25 MR. HUNTER: Judge, repetitive, I object.



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1 THE COURT: I don't know yet. Overruled.
2 **A.** I keep answering you every time you ask
3 me, do I know what radiologist dictated this or do I
4 know --
5 Sir, can I just finish?
6 You asked me, do I know who has been the
7 treating physician in this instance or that
8 instance, and I've told you every time that I do not
9 know because I've not looked at the medical records
10 with that in mind.
11 My main job was to look at the X-rays and
12 provide my opinion, not to compare with other
13 radiologist's reports and not to extensively go over
14 the medical records to see who the treaters were and
15 how they treated.
16 **Q.** So you don't know what diagnosis was being
17 made of this patient on 1-2-97, or anything
18 approximating the first part of January of 1997?
19 **A.** No, sir, I do not.
20 MR. HUNTER: Objection, repetitive.
21 THE COURT: Sustained.
22 BY MR. REILLY:
23 **Q.** Doctor, I'm going to take you to 12-7-99.
24 This is a radiology report by a Dr. Louise
25 Manquen; is that correct?



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1 MR. HUNTER: Judge, I object on the same
2 grounds as previously stated concerning this
3 new radiology report by another doctor.
4 THE COURT: I think we've reached our
5 ending. Sustained. Move on.
6 MR. REILLY: Your Honor, may we go
7 sidebar?
8 (The following proceedings were had at
9 sidebar:)
10 MR. REILLY: Your Honor, in light of your
11 ruling, I need to make a proffer. I need to
12 proffer that I would put on the Elmo about two
13 more radiographic interpretations because I'm
14 in 1999. This lady -- we only have until 2001
15 to go. And I think I had this one and one more
16 that I was going to put up, so that I would
17 have covered both 1999 and 2000, because
18 there's a CT scan, a very important CT scan
19 taken at Jackson Memorial Hospital in June of
20 2000.
21 THE COURT: Lower your voice.
22 MR. REILLY: And that CT scan is extremely
23 important in this case, Your Honor, because
24 it's the last and most current CT scan taken of
25 this patient. And my intention was to put



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1 those up, as I've done with these others and
2 say: Is there any reference to peribronchial
3 thickening, is there any reference to
4 emphysema?
5 So that is what I would put into evidence
6 at this time. That's my additional examination
7 that I would have of this witness.
8 MR. ENGRAM: Your Honor, in addition, the
9 CT scan of 2000 is relevant because that's the
10 admission that she had when she was tested for
11 the lung transplant.
12 And this witness, contrary to prior
13 deposition testimony yesterday, offered for the
14 first time that because of her COPD she
15 necessitates this lung transplant.
16 MR. HUNTER: Do you need argument from me?
17 THE COURT: No. Your proffer is noted.
18 (The sidebar conference was concluded, and
19 the following proceedings were held in open
20 court:)
21 THE COURT: Ladies and gentlemen, we'll
22 take a five-minute recess.
23 (The jurors exited the courtroom.)
24 MR. ENGRAM: Your Honor, is Mr. Reilly now
25 going to be able to make his proffer with the



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1 witness?
2 THE COURT: What difference does it make?
3 I mean, the juror is just going to the
4 restroom, he'll be right back. But the proffer
5 I assume is accurate. I'll let you supplement
6 the record if you think it isn't accurate. But
7 I don't see any reason to waste time on that.
8 MR. REILLY: Correct me if I'm wrong, Your
9 Honor, but I think what I need to do is say
10 what the evidence would show.
11 THE COURT: Put it on the record. Proffer
12 what you want to show.
13 MR. REILLY: But I'd rather do it outside
14 the hearing of the witness.
15 THE COURT: Wait until this witness is
16 through.
17 MR. REILLY: Okay.
18 (A recess was taken.)
19 MR. HUNTER: Judge, can I ask the witness
20 a question as to what he has with him, in order
21 to facilitate my examination?
22 THE COURT: Mr. Reilly, we have a
23 question.
24 MR. HUNTER: Do you have the films that
25 correspond to these reports?



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1 MR. REILLY: No.
2 MR. HUNTER: Where are they? You don't --
3 MR. REILLY: Absolutely not.
4 MR. HUNTER: Do you, Doctor?
5 THE WITNESS: They're probably all in that
6 pack of films.
7 MR. HUNTER: Where is that?
8 THE WITNESS: Whatever packs we had over
9 there.
10 (The jurors entered the courtroom.)
11 THE COURT: Doctor. If you'd come back up
12 here.
13 Have a seat, make yourself comfortable.
14 Any time you come in, please take a seat.
15 Don't stand on formalities.
16 Let the record reflect our jurors are
17 present and accounted for and ready to proceed.
18 Mr. Reilly, it's all yours.
19 BY MR. REILLY:
20 **Q.** Doctor, yesterday you talked about what
21 made it necessary for Ms. Fontana to have her lung
22 transplant, correct?
23 **A.** Yes, sir.
24 **Q.** And you indicated that in your opinion
25 there were two disease processes going on that



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1 necessitated her lung transplant, one was her severe
2 sarcoidosis and the other was this emphysema that
3 you've diagnosed, correct?
4 **A.** And others have diagnosed.
5 **Q.** Others?
6 **A.** Yes, sir.
7 **Q.** I think we've only seen one other person
8 who has written down the term "severe COPD,"
9 correct?
10 **A.** I was referring on the two separate
11 reports on different dates.
12 **Q.** That's one person, right, Dr. Gardiner?
13 **A.** You established that it was one person,
14 that's correct.
15 **Q.** Do you know how many radiologists have
16 looked at the X-rays and CT scans of Ms. Fontana?
17 **A.** No, I have not counted them. And as you
18 know, I don't even have all the reports from all the
19 radiologists who read the films.
20 **Q.** Do you know whether the people -- do you
21 know where the lung transplant is to occur?
22 **A.** No, sir.
23 **Q.** You don't know the name of the
24 institution?
25 **A.** I have no reason why I should know that.



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1 I've told you before and I'll tell you again that
2 I've not looked at the medical records with any of
3 that in mind. My main duty in this case was to look
4 at the X-rays. So I'm not privy or did I even
5 attempt to find out where a potential lung
6 transplant would take place for this person. That
7 would be a clinical type of thing, not something
8 that I would do as a radiologist.
9 **Q.** Do you know, Doctor, if whether or not in
10 determining the candidacy of Ms. Fontana for a lung
11 transplant, she underwent a CT scan at the
12 institution where the transplant is to take place?
13 **A.** No, I do not, because I have not reviewed
14 the medical records, as I told you.
15 **Q.** Did Mr. Hunter or any of these plaintiff
16 lawyers give you the CT scan from that institution
17 to review?
18 **A.** Well, since I don't know what institution
19 is doing or thinking about doing the lung
20 transplant, I have no way of knowing whether a CT
21 scan from that potential lung transplant institution
22 has been given to me.
23 **Q.** Doctor, do you still have your deposition
24 in front of you?
25 **A.** I do.



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1 **Q.** On the front of it doesn't it say what
2 records you were given?
3 **A.** You're talking about the exhibits that
4 were marked for identification?
5 **Q.** Yes.
6 **A.** Yes, I do have that list.
7 **Q.** Jackson Memorial Hospital, right here in
8 Miami, Florida?
9 **A.** It says, "Medical Records from Jackson
10 Memorial Hospital," yes.
11 **Q.** Did you even glance at those?
12 **A.** As I told you, I paged through them, but I
13 had no particular interest in establishing whether
14 that place would or would not be the hospital that
15 would do the lung transplant, because that was
16 totally irrelevant regarding my looking and
17 interpreting the films.
18 That would be a clinical decision. They
19 might choose at the last moment to send her to the
20 Mayo Clinic or to Mass. General or UC San Francisco,
21 wherever the best transplant team is available and
22 wherever the lung transplant is available for that
23 patient.
24 So that did not have particular relevance
25 for me in this case as the X-rays would, since I am



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1 an expert at looking at X-rays.
2 **Q.** Doctor, all that stuff you just said about
3 she might go to the Mayo Clinic or somewhere, do you
4 know where this lung transplant will take place if
5 it happens?
6 **A.** Sir, I just told you, I had no idea where
7 the lung transplant will take place, and I think
8 until it does take place no one can be 100 percent
9 certain that it will take place or it will take
10 place at that institution.
11 **Q.** Do you know --
12 **A.** That may be the hospital that has worked
13 her up for the lung transplant, but I have no idea
14 whether it really will be done there or not.
15 **Q.** Do you know whether a CT scan that's taken
16 and interpreted at Jackson Memorial as part of her
17 evaluation for the lung transplant --
18 **A.** As I've said before, I've not looked at
19 the medical records to establish or remember places
20 where the films were done. I've looked at the
21 films.
22 So if we want to get that film out, I will
23 be glad to look at it.
24 **Q.** Did you look at the report of that film?
25 **A.** Again, I told you these are the reports



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1 that I have with me and I read them off --
2 Q. Do you have a report from June of 2000
3 from Jackson Memorial Hospital?
4 MR. HUNTER: Objection, Your Honor. This
5 was addressed at sidebar.
6 THE COURT: Okay.
7 MR. HUNTER: Same question.
8 THE COURT: Come over.
9 MR. REILLY: I think he's making an
10 objection.
11 THE COURT: What did you say?
12 MR. HUNTER: This is an objection
13 concerning the additional reports that the
14 Court ruled on at sidebar.
15 THE COURT: Overruled.
16 THE WITNESS: The CT date that you're
17 referring to is which date?
18 BY MR. REILLY:
19 Q. June 2000.
20 A. And the exact date in June is --
21 Q. I think it's the 14th. There's only one
22 CT scan taken at Jackson Memorial Hospital.
23 A. I found it, it's from 6-15-2000 --
24 Q. I was a day off.
25 A. -- of the chest.



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1 Q. Did you look at that report?
2 A. Yes, sir, I did.
3 Q. There's no mention of COPD, no mention of
4 emphysema or peribronchial thickening on that
5 report, is there?
6 MR. HUNTER: Objection.
7 THE COURT: Overruled.
8 A. I do not see any that is mentioned on
9 here.
10 BY MR. REILLY:
11 Q. In your review, limited review of the
12 Jackson Memorial records that you were provided by
13 Mr. Hunter, did you see the clinical evaluation
14 filled out by the lung transplant director,
15 Dr. Debra Fertel?
16 A. I have no idea whether I did or did not.
17 I think at this point in time you're asking me
18 clinical questions, and I've already told you many,
19 many times, I have not looked to the records
20 regarding clinical things. I have looked at the
21 films primarily. That was my main concern, to look
22 at the films, interpret the films and provide an
23 opinion.
24 So I do not know who Dr. Fertel is. And
25 if I did read her name, I don't remember it, just as



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1 even these X-ray reports that I have in my
2 possession, I don't remember the names of these
3 doctors.
4 I did not look at this case to see whether
5 I agree or disagree or whether they left anything
6 out on their reports. I looked at the films so that
7 I could form my own opinions, not to see if they
8 coincide or not coincide with someone else's
9 opinions.
10 MR. HUNTER: Your Honor, may we approach?
11 THE COURT: Yes, sir.
12 (The following proceedings were had at
13 sidebar:)
14 MR. HUNTER: Judge, I have to admit I'm
15 confused. I had objected to any additional
16 questioning on further reports. Mr. Reilly
17 made a proffer. I asked the Court whether he
18 needed additional argument from me. You said
19 no. I've --
20 THE COURT: I thought he took a different
21 tack. But since now it's obvious where we're
22 going --
23 MR. HUNTER: He just did exactly what you
24 ruled he couldn't do.
25 THE COURT: I'm afraid so. This line of



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1 inquiry is over.
2 MR. REILLY: In fact, I'm done, Your
3 Honor.
4 MR. HUNTER: He did it.
5 MR. REILLY: No, that's not correct.
6 THE COURT: It's over.
7 (The sidebar conference was concluded, and
8 the following proceedings were held in open
9 court:)
10 BY MR. REILLY:
11 **Q.** Dr. Foley, your diagnosis of emphysema is
12 something that you've come to between your
13 deposition last week and today, correct, or
14 yesterday?
15 **A.** No, sir.
16 **Q.** When you looked at the X-ray, 1-3-92, last
17 week when I asked you whether or not you saw changes
18 radiographically consistent with sarcoidosis, you
19 did, right?
20 **A.** Yes, sir.
21 **Q.** And when I asked you whether or not you
22 saw peribronchial thickening, you said you did?
23 **A.** Yes, sir.
24 **Q.** And when I asked you whether you saw
25 anything other than that you didn't, correct?



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1 **A.** Well, it depends on what you mean by
2 "anything other than that."
3 **Q.** Well, did you tell me last week that you
4 saw emphysema?
5 **A.** I didn't mention the word specifically.
6 But the emphysema is there. And it's caused by --
7 **Q.** When I asked you last week --
8 **A.** I'm not finished, but that's okay.
9 **Q.** Pardon?
10 **A.** I said I was not finished, but that's
11 okay.
12 **Q.** Well, I specifically -- you want to turn
13 to Page 137, Line 7.
14 **A.** I've got it.
15 **Q.** The question I asked was: "Let's look
16 at -- looking back again at 1-3-92 you saw symptoms
17 consistent with sarcoidosis, right?
18 Your answer was: "I did not see
19 symptoms."
20 I said: "I'm sorry. You're right. You
21 saw changes radiographically that were consistent
22 with sarcoidosis?"
23 And then you said: "Correct."
24 And I said: "Did you see any other
25 changes that were consistent with some other lung



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1 anomaly other than peribronchial thickening?"
2 And your answer was: "Other than
3 peribronchial thickening."
4 My question was: "Correct.
5 "I guess I'm not fully understanding the
6 question.
7 "Well, I asked you whether you saw --
8 maybe I didn't say it in a way that was
9 intelligible. I don't know. But 1-3-92 -- you told
10 me you saw radiographic changes consistent with
11 sarcoidosis, correct?"
12 And your answer was: "Yes.
13 "And I asked you whether you saw
14 radiographic changes consistent with some other lung
15 disorder other than peribronchial thickening, which
16 you already mentioned. Is there anything on that
17 X-ray, other than the changes that you see, that are
18 consistent with sarcoidosis and this peribronchial
19 thickening which you've reported already?"
20 And your answer was: "No, not really."
21 Right?
22 **A.** I agree with that.
23 **Q.** And I asked you the same thing about the
24 7-6-95 X-ray just last week, right?
25 **A.** Yes, sir.



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1 Q. And you made no mention of emphysema, did
2 you?
3 A. No, sir.
4 Q. I asked you the same question about the
5 9-9-99 X-ray and you made no mention of emphysema
6 last week, did you?
7 A. Correct, I agree with that. And the
8 reason is that peribronchial thickening is part and
9 parcel of emphysema. It's on the films.
10 I assume that you know, since you do these
11 type of cases, that peribronchial thickening causes
12 obstruction of the bronchus, which leads to
13 obstruction of the alveoli, which is emphysema.
14 Q. Your --
15 A. I didn't think that I needed to explain
16 that and you never asked me that further during my
17 deposition.
18 Q. You're indicating now to this jury that
19 the peribronchial thickening that you observe on
20 these films in your opinion is reflective of
21 emphysema, correct?
22 A. Peribronchial thickening causes emphysema,
23 and we could see that on those films already. And
24 it progressed in this patient over time to the point
25 that ultimately one radiologist did think that the



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1 patient had severe COPD. Severe COPD didn't just
2 happen all at once or all of a sudden. This patient
3 didn't jump from never having COPD because no
4 radiologist ever mentioned it to having severe COPD
5 seen on a CT scan and also air trapping, which is
6 consistent with COPD on a chest film. It developed
7 slowly over time. And that was there, but it wasn't
8 mentioned.
9 Most likely, if I could put my mind into
10 the other radiologist's mind, knowing how
11 radiologists work, they probably didn't mention it
12 because the thing that they were asked to evaluate
13 predominantly was sarcoidosis.
14 No one said: Evaluate for possible COPD.
15 And I think that you tend to mention those findings,
16 A, when they're very prominent or severe, or you
17 tend to mention those findings if you're asked to
18 specifically look at that.
19 **Q.** Doctor, is emphysema the same thing as
20 chronic bronchitis?
21 **A.** No. Chronic bronchitis and emphysema are
22 two different things, although chronic bronchitis
23 can lead to emphysema because of the obstruction of
24 the bronchials.
25 **Q.** But they're two different disease



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1 for any disease process other than sarcoidosis, have
2 you?
3 **A.** Consulted by who?
4 **Q.** Anybody.
5 **A.** Well, I'm an expert reviewing the films in
6 the case. I wouldn't expect that I would be
7 consulted, because the treating physicians probably
8 don't know me, they don't come to Tampa to ask me
9 about that. They're probably evaluating her
10 wherever she's going.
11 MR. REILLY: No other questions, Your
12 Honor.
13 THE WITNESS: I would not be involved with
14 her care that way.
15 THE COURT: Redirect.
16 REDIRECT EXAMINATION
17 BY MR. HUNTER:
18 **Q.** Doctor, you've been asked several
19 questions about the opinions of other doctors here
20 this morning and yesterday afternoon. You've had an
21 opportunity to review the deposition that was taken
22 of the radiologist hired by Brown & Williamson?
23 **A.** Yes, sir.
24 **Q.** And if in fact that doctor testified in
25 his deposition when I asked him --



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1 MR. REILLY: May we approach sidebar?
2 THE COURT: Yes, sir.
3 (The following proceedings were had at
4 sidebar:)
5 MR. REILLY: This is exactly what Mr.
6 Hunter just argued that I can't do.
7 MR. HUNTER: Absolutely, I admit it. He
8 beat me to death like a bloody knub.
9 THE COURT: And because you got me to
10 think that maybe it was a second question, I'm
11 going to let the door wide open. So you may
12 proceed.
13 MR. REILLY: Your Honor, hang on a second.
14 He's going to ask -- I never asked, in fact I
15 never asked whether or not somebody was right
16 or wrong --
17 THE COURT: I haven't heard his question
18 yet. I'm going to wait until I hear his
19 question. Because I don't know what he's going
20 to ask this time. I'm not quite certain where
21 he's going. I'm going to have to listen to
22 this question.
23 (The sidebar conference was concluded, and
24 the following proceedings were held in open
25 court:)



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1 BY MR. HUNTER:
2 Q. Doctor, have you read the deposition of
3 the radiologist that was retained by Brown &
4 Williamson and RJ Reynolds in this case?
5 A. Yes, I have.
6 Q. Dr. Koenigsburg?
7 A. Yes, I have.
8 Q. Did you read the question where I asked
9 him whether he saw, and I'll quote --
10 MR. ENGRAM: What page?
11 MR. HUNTER: Page -- well, it's got a hole
12 in my page. 34.
13 BY MR. HUNTER:
14 Q. "Question: What about peribronchial
15 thickening?
16 "Answer: What about it?
17 "Question: Can you see that on an X-ray?
18 "Answer: You can see that on an X-ray.
19 "Question: Have you looked to see if
20 there's any evidence of that in any of these films?"
21 And his answer was: "There may be some
22 evidence of peribronchial thickening."
23 Did you read that question and answer?
24 MR. REILLY: I'm sorry. Read on, would
25 you?



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1 **A.** I did.

2 THE COURT: Please read.

3 **Q.** Did you read this question and answer:

4 "Would that be an indication of airways disease?

5 "Answer: No.

6 "Why not?

7 "Answer: Well, the bronchi are not the

8 airways that you are talking about. The airways are

9 the alveoli. The bronchi are the tubes that go down

10 to the airways.

11 "Question: What about diseases of the

12 bronchi?

13 "Mr. Reilly: What about it?

14 "Question: Do you see any evidence of

15 that on these films?

16 "Answer: What do you mean by "disease of

17 the bronchi"?

18 "Question: Thickening.

19 "Answer: Peribronchial thickening, is

20 that what you are referring to?

21 "Queston: Yes.

22 "Answer: There may be some areas of

23 peribronchial thickening.

24 "Question: In terms of disease, what

25 would that indicate, if anything?



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1 "Answer: It would indicate inflammation
2 such as, i.e., bronchitis."
3 Now, is that consistent with your
4 findings?
5 **A.** Yes, sir.
6 **Q.** Now --
7 MR. REILLY: Your Honor, for completeness,
8 I think you have to read Page 37, Line 3.
9 THE COURT: What page were we just on?
10 MR. HUNTER: Judge, I believe this is my
11 cross-examination. I didn't get up in the
12 middle of his --
13 THE COURT: What page were we just on?
14 MR. ENGRAM: 36.
15 THE COURT: Let me see it myself. I'll
16 look at it.
17 MR. HUNTER: Where do you want me to go,
18 I'll --
19 THE COURT: Let me just take a look.
20 MR. HUNTER: Judge, I'm going to go on.
21 I'm going to volunteer --
22 THE COURT: Hold on one second.
23 THE COURT: Specifically on Page 37? What
24 line?
25 MR. ENGRAM: 3 to 7.



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1 THE COURT: 3 to 7.
2 MR. HUNTER: 36 or --
3 THE COURT: 37 he's saying. Overruled,
4 it's already been covered, it's repetitious.
5 BY MR. HUNTER:
6 **Q.** Doctor, is that -- in fact, the
7 radiologist that was retained by Brown & Williamson
8 and RJ Reynolds, is that consistent with your
9 readings of the actual films concerning bronchitis,
10 peribronchial thickening superimposed upon this
11 lady's lung disease, pre-existing lung disease, of
12 sarcoidosis?
13 **A.** It is.
14 **Q.** Now, I think a point was made today that
15 I'd like to go back to.
16 We have here a CT scan of January '96.
17 Are your eyes good enough to see this CT -- I'll
18 hand you the report.
19 **A.** I can see it from up there, too. That's
20 fine. If you want the jury to see it.
21 **Q.** I can't see it, but maybe the jury can.
22 I'll leave it there.
23 Now, we have the CT scan of 12-96.
24 Correct?
25 **A.** Yes.



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1 Q. Now, the doctor who looks at the January
2 '96 CT scan makes no comment about severe COPD,
3 correct?
4 A. Correct.
5 Q. The doctor who looks at the CT scan a year
6 later makes the comment of severe COPD, correct?
7 A. Yes.
8 Q. Now, is it possible medically for someone
9 to not have any COPD in January, and by December, in
10 this patient, have severe COPD?
11 A. No.
12 Q. What medically do doctors recognize
13 concerning -- what is it called when two physicians
14 look at the same film and describe what they see
15 differently? What is the medical term for that?
16 A. Medical term is called interobserver
17 variability.
18 Q. Could you explain that to the jury?
19 A. Yes, sir. There's actually two terms,
20 interobserver variability and intraobserver
21 variability. Interobserver variability would mean
22 if I put a chest film up and I ask you to read this
23 chest film for me as a radiologist, you might say
24 certain things a certain way and come to your
25 conclusion. And if I ask you as a radiologist to



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1 read this same chest film that was just read by that
2 radiologist over there, you might read the film a
3 different way and come to your own conclusions and
4 your own diagnosis.
5 And if we compared word to word, your
6 words may be nothing similar at all to her words.
7 But yet you're a board-certified radiologist and
8 you're a board-certified radiologist. Both have
9 good training and have expertise in reading those
10 chest films.
11 Interobserver variability is the fact that
12 different persons could look at the same film and
13 come to different conclusions, but still be within
14 the standard of care of reading that film correctly.
15 The other difference is intraobserver
16 variability. Intraobserver means within the person,
17 intra. So that means that I could show you a film
18 today, the 12-2-96 CT scan and ask you as a
19 radiologist to look at that film and you read it a
20 certain way. And I could hold that film back for a
21 couple of weeks and say: Hey, I've got another
22 interesting case. And put that same film up and ask
23 you to dictate it, and you may find different
24 findings, more findings or less findings than you
25 did the first time that you dictated it.



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1 And yet you're still within the standard
2 of care, you've still done a good dictation, no one
3 would find medical negligence fault to you for the
4 way you dictated it the first time versus the second
5 time.
6 So intraobserver variability is just the
7 fact that all of us, if asked to say words, will
8 choose to say them a certain way on a certain day,
9 will see certain things a little bit better on a
10 certain day. And then on another day may look at
11 that same exact thing, you being the same person,
12 and yet you may look at it a little differently, you
13 now see peribronchial thickening when you didn't see
14 it before, you now see emphysema when you didn't see
15 it before, et cetera.
16 So that's the main things that
17 radiologists deal with when we read films is we deal
18 both with intraobserver variability, the fact that
19 your partner may have talked about something that
20 you didn't or vice versa, and the fact that you,
21 even looking at the same film, may interpret that
22 same film slightly differently, choose different
23 words to say it on a different day than you did
24 today.
25 Q. Doctor, I have the CT scan for --



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1 You have a shadow box behind you. See if
2 we can turn it on, and I'm going to give you the CT
3 scan from January of '96.
4 Let me give you the CT scan. And let me
5 ask you, before you do this, what is the highest and
6 best evidence for the jury, in your opinion, to look
7 at the reports of other doctors --
8 MR. REILLY: I object, Your Honor.
9 THE COURT: Overruled.
10 BY MR. HUNTER:
11 **Q.** -- to look at the reports of other doctors
12 or to actually see the film?
13 **A.** Well, in my opinion the best thing is
14 seeing is believing. So I think if I would be able
15 to show the jury what I'm talking about and they can
16 understand it and see it with their own eyes, then I
17 think they would stand the best chance of believing
18 it rather than reading a bunch of words on a page.
19 **Q.** Let's look at the CT scan from January of
20 '96 and tell us what you see.
21 **A.** This is -- and you wanted 1-4-96?
22 **Q.** Yes.
23 **A.** Let me show the jury something that they
24 haven't seen before, because we've been focusing so
25 much on the lung windows. I just wanted them for a



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1 second to see how the CT looks the other way.
2 You got to see mostly lung windows when I
3 showed it to you last time. But these are the
4 mediastinal windows that I was talking about. And
5 notice that you do not see the detail in the lungs
6 on these views, you don't see all those little white
7 lines.
8 What this window setting is meant to show,
9 these are called mediastinal windows so you can look
10 at the mediastinum and see detail in the
11 mediastinum.
12 For instance, here is contrast coming into
13 the superior vena cava. Here is adenopathy that I
14 was talking about before that can be seen back as
15 early as the 1989 film that I had. This is the
16 actual demonstration of that on CT. It's a mass
17 right here, called right peritrachial, because it's
18 just to the right of the trachea and posterior to
19 the cava.
20 When we get down, for instance, to this
21 picture here, excellent example of hilar adenopathy.
22 These large masses that we're seeing here is the
23 adenopathy of sarcoidosis.
24 So, in reading this film, obviously I
25 would talk about that, I would talk about the right



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1 peritrachial adenopathy and I would talk about the
2 bilateral hilar adenopathy that I think is very
3 consistent with sarcoidosis.
4 Okay, these are the same levels that we
5 just looked at. Matter of fact, here's the same
6 superior vena cava, but now with the window
7 settings. So we're seeing all the intimate little
8 detail of the lung fields.
9 What I wanted to show you here is two
10 separate kinds of findings that you can see.
11 There's actually a lot of findings that you can see,
12 but I'll point out a couple.
13 Let's start with this film, for instance,
14 just to reference it. This is on January 4th, 1996
15 and it's image number 11, with intravenous contrast.
16 If you look at this film and, even from 20, 25 feet
17 away, you can look at this left lung field and see
18 certain linear white markings going through it.
19 You look at this film over here, same cut,
20 and we're in the right lung field now, and what do
21 we see here? Well, we see sort of a sharp,
22 demarcated area of blackness filling most of this
23 right lung field. And notice how we can almost draw
24 a line right here as if the lungs did it themselves.
25 And it's a different opacity here than here.



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1 And if we looked more carefully, we can
2 even see blackness in other areas, but this is a
3 particularly striking example. What this blackness
4 is is that's emphysema that is involving that
5 portion of the lobe on the right.
6 And we can see similar examples when we
7 look at this. For instance, we see relative more
8 blackness over here, which is emphysema, compared to
9 other areas. Even though this entire lung field is
10 filled with emphysema, this area here stands out
11 particularly well.
12 And again, going back, this one stands out
13 obviously very well as well.
14 We go to this view and again, over in the
15 right lung field we see another demarcated area that
16 is -- has total absence of linear opacities here
17 compared to the adjacent area and compared to this
18 that has ground glass opacity. This is classic
19 emphysema seen on a CT scan.
20 ***Q.*** So, am I correct that the films are
21 consistent between January of '96 and December of
22 '96, but there's interobserver variability in that
23 one physician commented about one thing and one
24 another?
25 ***A.*** Yes, sir, that's correct.



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1 **Q.** Does it surprise you that treating a woman
2 who had continuing sarcoidosis, that the findings of
3 emphysema and COPD were not more prominently made,
4 is that surprising to you?
5 **A.** No, it's not.
6 MR. REILLY: Object, Your Honor.
7 THE COURT: Overruled.
8 BY MR. HUNTER:
9 **Q.** Go ahead.
10 **A.** It's not surprising, because we commonly
11 see emphysema, we commonly see COPD. And we
12 commonly see that in people that are getting these
13 kind of films, because they may be smokers. And we
14 commonly see emphysema in smoking, smoking in
15 emphysema. We see that all the time.
16 It would be the same thing as I might not
17 comment when I'm looking at an elder person's spine
18 of arthritic spurs in their spine. We all get those
19 virtually as we get older. Virtually, it's a common
20 finding.
21 If you see a lot of COPD and emphysema in
22 your hospital, you don't mention it all the time.
23 That's not the predominant thing that you're going
24 to talk about here. You're going to talk about
25 something that we don't see all that commonly, which



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1 is bilateral hilar and right peritrachial
2 adenopathy, which is a classic sine qua non of
3 sarcoidosis.
4 That's what the natural tendency of a
5 radiologist that's diagnosing that would talk about.
6 Yet as you're pointing out, here we have a
7 12-96 CT that says COPD, yet we can go back to
8 almost one year to this film, and there is emphysema
9 and COPD on that film that wasn't mentioned. I
10 don't know why the radiologist didn't mention it, he
11 didn't.
12 **Q.** All right. The -- let's go now to --
13 Let's go to the Holy Cross AP chest films that you
14 were examined on of January 5th, '97.
15 **A.** You want to do 1-3-97? That's what this
16 one is. Or do you want to do 1-5-97?
17 **Q.** I want to do this one, that's 1-5, right?
18 **A.** Yes.
19 **Q.** And you had said "air trapping."
20 **A.** The radiologist, when he read this film,
21 his bottom line sentence was air trapping. And let
22 me just unzoom this a little bit.
23 What you can see by looking at this film
24 is there is a predominance of lung markings that
25 we're seeing down here at this right base. We're



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1 seeing some predominance of lung markings up here in
2 the apical region on the right. We're seeing finer
3 interstitial markings in the left lung zone and a
4 little bit, then here at this left costophrenic
5 angle. But what my eye sees --
6 Let me back this up. What my eye sees is
7 a large zone of blackness right here and a very
8 large zone of blackness in the left lung field, as
9 compared to the right base, the right upper lobe,
10 the left upper lobe and the left base.
11 So in this entire large lung zone on both
12 sides we're seeing large areas of blackness, which,
13 as I described before, is emphysema or COPD or air
14 trapping or any other among a cadre of cytomas for
15 COPD, air trapping is just another radiology word
16 for the same thing, emphysema.
17 **Q.** If you were to make a diagnosis or if you
18 were to have to be charged with the obligation of
19 coming up with an opinion as to what this patient's
20 condition was, would you look at the reports or
21 would you look at the actual films?
22 **A.** I'd look at the films, I don't look at the
23 reports, just as I did in this case. I was asked to
24 give an opinion as an expert about these films, and
25 I feel my task as an expert isn't to say back to you



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1 or repeat back to you what's on a report. I'm going
2 to give you my expert opinion of what's on the
3 films. That's what you want to hear from an expert.
4 If you didn't want to hear that, then you could just
5 go by the report and not talk to any radiologist.
6 **Q.** Doctor, take a seat, please, thank you.
7 I'm sorry. I spoke too soon.
8 The Jackson CT film that you were asked
9 about the report of this film. This is the actual
10 film. Would you take a look at that for us?
11 **A.** We can start out with this, we're in the
12 upper lung fields. Let me kind of window this
13 better so we can see it, not so bright.
14 Anyway, these are window settings, not
15 mediastinal, because we're mainly talking about the
16 lungs so far. Again, what we can see here, what
17 date? 2000.
18 **Q.** These are the Jackson Memorial Hospital?
19 **A.** 6-15-2000.
20 **Q.** Yes.
21 **A.** We can see that something has happened up
22 here. The patient has developed a mass, it actually
23 looks like two masses. This is the aspergilloma
24 that we've talked about. We can see a coalescence
25 of opacities in the right upper lobe up here, which



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1 I think ultimately may have been diagnosed as an
2 additional fungus ball occurring in the right upper
3 lobe.
4 But also what we're seeing again, even
5 with this chest involved, with things that we have
6 talked about are related to sarcoidosis, is
7 superimposed emphysema.
8 Here is a classic example of emphysema
9 along this margin. And I want to magnify this so we
10 can see this better. It shows it nicely right
11 there.
12 This black area that you're seeing along
13 here, this lack of architecture that you're seeing
14 in here is all emphysematous change. This is just
15 on one slice. This is a slice that's most heavily
16 involved that I can find with sarcoidosis, and shows
17 simultaneously emphysema in the lungs.
18 We have fibrosis here which I would
19 ascribe most likely to sarcoidosis, no argument at
20 all with that. Aspergilloma that's most likely
21 caused by sarcoidosis, no argument with that.
22 But this lady has emphysema all over the
23 place.
24 Here's that other zone that we saw and you
25 can see it's in the exact same shape that we saw on



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1 the previous CT. It's this L, reverse L-shaped zone
2 of hyperlucency, which is emphysema. Everything
3 that we see on every cut has emphysema on it.
4 **Q.** Doctor, the existing disease of
5 sarcoidosis, the existing condition, is there any
6 doubt in your mind medically that an aggravation of
7 that existing condition is the emphysematous changes
8 that you see in this film?
9 **A.** There is no doubt.
10 MR. REILLY: Objection.
11 THE COURT: Overruled.
12 BY MR. HUNTER:
13 **Q.** Emphysema, COPD, bronchitis?
14 **A.** There is no doubt that the emphysema in
15 this lady is an aggravation to her underlying
16 disease of sarcoidosis. There's no question.
17 MR. HUNTER: Okay. Thank you, Doctor, I
18 have no further questions.
19 THE COURT: Ladies and gentlemen, since
20 it's ten minutes --
21 Doctor, thank you very much.
22 Since it's about ten minutes to 12:00, I
23 think it would be appropriate to take a lunch
24 break. If we can come back at 1:20, meet Todd
25 on the second floor, he'll bring you up and



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1 we'll start as quickly as we can.
2 (The jurors exited the courtroom.)
3 THE COURT: Anything before we recess?
4 MR. ENGRAM: Your Honor, if they're going
5 to show any -- I don't know who their next
6 witness is, but if they're going to show a
7 video tape, we haven't had a chance to review
8 that.
9 THE COURT: Who is the next witness?
10 MR. HUNTER: It's going to be a flight
11 attendant by the name of Olivia Chambers and
12 then a flight attendant by the name of Carolyn
13 Hurley.
14 THE COURT: Okay.
15 MR. REILLY: Some time, I don't know
16 whether Dr. Irvin has participated today or
17 not.
18 THE COURT: Dr. Irvin?
19 MR. HUNTER: Yes, he is.
20 MR. REILLY: Sometime before he comes, we
21 need to argue this Frye motion of Dr. Irvin.
22 THE COURT: Okay, we will take it just
23 before -- take a recess and take it just before
24 he gets on the stand.
25 (A lunch recess was taken.)



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